

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KORY RAZAGHI; ATTENTUS LLC,)
)
 Plaintiffs,)
 vs.)
)
 RAZAGHI DEVELOPMENT COMPANY,)
 LLC; AHMAD RAZAGHI; MANUEL)
 MORGAN,)
)
 Defendants.)

Case No.: 2:18-cv-01622-GMN-DJA

ORDER

Pending before the Court is the Motion to Dismiss the Third Amended Complaint, (ECF No. 123), filed by Defendants Ahmad Razaghi (“Ahmad”) and Razaghi Development Company, LLC (“RDC”), (collectively, “Defendants”). Plaintiffs Attentus LLC (“Attentus”) and Kory Razaghi (“Kory”), (collectively, “Plaintiffs”), filed a Response, (ECF No. 124), and Defendants filed a Reply, (ECF No. 128).

Also pending before the Court is Plaintiffs’ Motion for Partial Summary Judgement, (ECF No. 129). Defendants filed a Response, (ECF No. 137), and Plaintiffs filed a Reply, (ECF No. 145).

Also pending before the Court is Defendants’ Cross-Motion for Partial Summary Judgment, (ECF No. 138). Plaintiffs filed a Response, (ECF No. 147), and Defendants filed a Reply, (ECF No. 149).

For the reasons discussed below the Court **GRANTS in part** and **DENIES in part** the Motion to Dismiss. The Court **DENIES** Plaintiffs’ Motion for Partial Summary Judgment. The Court **GRANTS in part** and **DENIES in part** Defendants’ Cross-Motion for Partial Summary Judgment.

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1 **I. BACKGROUND**

2 This case arises from Defendants’ alleged breach of the Settlement Agreement that the
3 parties executed to terminate their state court litigation, which concerned the parties’ healthcare
4 management and consulting ventures. Plaintiffs allege that Kory and Ahmad formed Attentus
5 in 2006. (Third Am. Compl. (“TAC”) ¶ 8, ECF No. 122). Attentus then joined with Defendant
6 Manuel Morgan (“Morgan”) to form M. Morgan & Associates, LLC (“MMA”). (*Id.* ¶ 9).
7 MMA subsequently executed a contract with Navajo Health Foundation-Sage Memorial
8 Hospital (“Sage”), (the “Sage Contract”) in February of 2007. Under the Sage Contract, Sage
9 allegedly agreed to pay MMA several hundred thousand dollars per year over a period of three
10 years to develop, finance, and build a new hospital for Sage in Ganado, Arizona. (*Id.* ¶¶ 10–12).

11 As MMA and Sage’s relationship matured, the Sage Contract went through a series of
12 amendments. MMA and Sage first amended the Sage Contract by executing the “Management
13 Addendum” in March of 2007. (*Id.* ¶ 13). The Management Addendum allegedly engaged
14 MMA to provide “management services” to Sage’s existing hospital in exchange for \$900,000
15 per year, paid in addition to the compensation provided under the original Sage Contract. (*Id.*
16 ¶¶ 14–15).

17 MMA and Sage next amended the Sage Contract in March of 2009 under the “Second
18 Addendum.” (*Id.* ¶ 16). The Second Addendum allegedly extended the term of the
19 Management Addendum through the end of September of 2013, altered compensation terms,
20 and appointed Ahmad as CEO of Sage’s hospital. (*Id.* ¶ 17). In 2010, just before disputes over
21 the Sage Contract arose, Kory and Ahamad executed an Operating Agreement for Attentus (the
22 “Attentus Operating Agreement”). (*Id.* ¶¶ 18, 20). Under the Attentus Operating Agreement,
23 Kory and Ahmad allegedly became entitled to equal revenues received for healthcare
24 consulting services, provider group and physician services, and “all related services” paid under
25 the Sage Contract and its amendments. (*Id.* ¶ 19).

When disputes over the Sage Contract surfaced in 2010, Ahmad allegedly formed a single-member LLC, Razaghi Healthcare LLC (“RH”)¹, and did not disclose the existence of the entity to Kory until January of 2013. (*Id.* ¶¶ 20–24). In March of 2011, Ahmad and the chairperson of the Sage Board of Directors allegedly executed a “CEO Services Contract” between Sage and RH. (*Id.* ¶ 25). Under the CEO Services Contract, Ahmad would continue to serve as CEO of Sage until February 28, 2015, and the agreement backdated the commencement of all CEO services performed under the Contract to November 10, 2010. (*Id.* ¶¶ 25–27). Kory alleges he was unaware of the CEO Services Contract until just before the execution of the Settlement Agreement. (*Id.* ¶ 28).

On April 21, 2011, Kory filed a civil suit in Nevada state court against Ahmad, Morgan, RDC, and other related entities. (*Id.* ¶ 29). On May 6, 2011, Morgan and Ahmad formed a limited liability company, Morgan Razaghi Healthcare (“MRH”), for the purpose of eventually assuming the obligations of the Sage Contract once the Sage Contract could be assigned from MMA. (*Id.* ¶ 30). The parties settled the state court litigation on January 11, 2013, executing the Settlement Agreement that Plaintiffs now allege Defendants breached. (*See id.* ¶ 31); (Settlement Agreement, Ex. 6 to Pls.’ Mot. Summ. J. (“MSJ”), ECF No. 130-5).² There are two classes of payments Kory alleges he has not been paid in breach of the Settlement Agreement—

¹ Plaintiffs allege that there are “Razaghi Healthcare LLCs” formed in Nevada and Arizona. (*See* Am. Compl. ¶ 31 n.1). The Court uses RH to refer to the companies collectively because neither party alleges that the distinct identities of the companies is material.

² Plaintiffs attempt to incorporate the Settlement Agreement by reference as an Exhibit to the TAC, (*See* TAC ¶ 31 n.2) (“The Settlement Agreement is attached to this Complaint as Exhibit 1”), but they have not filed any exhibits to the TAC. However, Plaintiffs previously filed the Settlement Agreement under seal. (*See* Settlement Agreement, Ex. A to Mot. Leave File Under Seal, ECF No. 28-1); Plaintiffs again filed a Settlement Agreement, containing identical terms as the previously filed Settlement Agreement, pursuant to a Stipulated Protective Order. (*See* Settlement Agreement, Ex. 6 to Pls.’ Mot. Summ. J., ECF No. 130-5). Defendants do not dispute the authenticity of the Settlement Agreement. (*See* Defs.’ Resp. to Pls.’ Mot. Summ. J., Statement of Undisputed Facts ¶ 14, ECF No. 137) (incorporating Plaintiffs’ Exhibit by reference). Therefore, when discussing the Settlement Agreement, the Court relies upon Exhibit 6 to Plaintiffs’ Motion for Partial Summary Judgment. The Court may also rely on the Settlement Agreement when considering the Motion to Dismiss. *See* Fed. R. Evid. 201; *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

1 “management fees” and “Bonus Payments.” (*See* Compl. ¶ 71); (Settlement Agreement ¶¶ 1.7,
2 1.9).

3 **A. Management Fees**

4 The Settlement Agreement provides that Kory shall be paid one-sixth of all
5 “management fees” received by MMA, MRH, or their successors or assigns under the Sage
6 Contract. (Compl. ¶ 32); (Settlement Agreement ¶ 1.7). Paragraph 1.7 of the Settlement
7 Agreement also provides, “[i]t is the intent of the parties that if [MMA], AHMAD or
8 [MORGAN] or any of their owned or controlled entities executes a contract with SAGE that
9 includes substantially the same services as are included in the currently existing contract and its
10 extensions, KORY will be entitled to share in the payments received in this Agreement.”
11 (Settlement Agreement ¶ 1.7). The provision also expressly extends to extensions or newly
12 executed “management contracts” that provide management fees to any entities that Ahmad
13 and Morgan hold interests in. (*Id.*).

14 The Settlement Agreement also includes relevant disclaimers of Kory’s rights that may
15 bear on his claim to receive a portion of management fees paid under the CEO Services
16 Contract. First, ¶ 1.7 of the Settlement Agreement provides that “nothing” in ¶ 1.7 applies to
17 “the contract for AHMAD to serve as CEO of SAGE.” (Settlement Agreement ¶ 1.7).
18 Additionally, Kory disclaimed all rights to payments made under “any contract pursuant to
19 which AHMAD serves as chief executive officer of SAGE.” (*Id.* ¶ 1.8).

20 Plaintiffs allege that Defendants deprived Kory of the benefits of the Settlement
21 Agreement in bad faith. (TAC ¶ 48). In substance, Plaintiffs contend that Ahmad influenced
22 the Sage Board of Directors to refrain from extending the Sage Contract and instead amend the
23 CEO Services Contract to include payments for the same services. (*Id.* ¶¶ 48–56, 58, 60–62).
24 As a result, Plaintiffs claim that the scope of the payments disclaimed exceeded the intent of the
25 parties when executing the Settlement Agreement. (*Id.* ¶¶ 57, 59, 72, 80–81).

1 **B. Bonus Payment**

2 Plaintiffs allege through various contract and tort claims that Defendants breached their
3 obligation to disclose and pay Plaintiffs a portion of the \$1,842,549.97 bonus payment (the
4 “Bonus Payment”) that Sage paid to RH in September of 2012. (*Id.* ¶ 36). Under the
5 Settlement Agreement, Kory is entitled to one-sixth of all Bonus Payments MRH or its
6 successors or assigns receives under the Sage Contract. (*Id.* ¶ 32); (Settlement Agreement
7 ¶ 1.9). However, the Settlement Agreement also provides a release that waives all the parties’
8 known or unknown claims that predate the execution of the Settlement Agreement and are
9 connected with the state-court action. (Settlement Agreement ¶ 2.1). Plaintiffs allege that
10 because the Bonus Payment was given for progress made in managing Sage from 2007–2012,
11 while the Sage Contract remained in effect, Kory should have received a portion of the Bonus
12 Payment. (TAC ¶¶ 10, 19, 38–40, 43).

13 Plaintiffs now assert claims for: (1) Breach of the Settlement Agreement; (2) Breach of
14 the Duty of Good Faith and Fair Dealing (Settlement Agreement); (3) Breach of the Duty of
15 Good Faith and Fair Dealing (Attentus Operating Agreement); (4) Breach of Fiduciary Duty;
16 (5) Unjust Enrichment; (6) Conversion; (7) Intentional Interference with Contractual Relations;
17 (8) Accounting; (9) Civil Conspiracy; (10) Alter Ego; and (11) Successor Liability. (*See id.*
18 ¶¶ 64–147). Defendants move to dismiss the TAC. (*See* Mot. Dismiss, ECF No. 123). The
19 parties also move for summary judgment regarding Plaintiffs’ entitlement to management fees
20 paid under the CEO Services Contract after Ahmad resigned as CEO of Sage’s hospital³ in
21 February of 2013. (*See* Cross-Mots. Summ. J., ECF Nos. 129, 138).

22
23 ³ Plaintiffs allege that they are entitled to management fees paid under the CEO Services Contract after Ahmad
24 resigned as CEO of Sage because the Settlement Agreement’s disclaimers only apply when Ahmad served as
25 CEO. (Pls.’ MSJ 20:19–24:19, ECF No. 129). Plaintiffs further allege that Ahmad testified in a deposition that
he resigned as CEO of Sage on September 26, 2013. (Ahmad Decl. ¶ 5, Ex. 12 to Pls.’ MSJ, ECF No. 131-12).
Defendants dispute Plaintiffs’ interpretation of the relevant disclaimers’ scope. (Defs.’ MSJ 14:23–19:25, ECF
No. 138). Defendants also argue that even if the Court accepts Plaintiffs’ interpretation, Kory was not entitled to
any management fees paid under the CEO Services Contract because Ahmad continued to serve as corporate

1 **II. LEGAL STANDARD**

2 **A. 12(b)(6)**

3 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
 4 that fails to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp.*
 5 *Comm'n*, 720 F.3d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
 6 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
 7 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.
 8 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
 9 complaint is sufficient to state a claim, the Court will take all material allegations as true and
 10 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792
 11 F.2d 896, 898 (9th Cir. 1986).

12 The Court, however, is not required to accept as true allegations that are merely
 13 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
 14 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
 15 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
 16 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
 17 *Twombly*, 550 U.S. at 555).

18 “Generally, a district court may not consider any material beyond the pleadings in ruling
 19 on a Rule 12(b)(6) motion ... However, material which is properly submitted as part of the
 20 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
 21 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
 22 “documents whose contents are alleged in a complaint and whose authenticity no party
 23 questions, but which are not physically attached to the pleading, may be considered in ruling on

24
 25

 CEO of Sage through 2018, and he resigned only from the position of hospital CEO in September 2013. (*Id.*
 19:26–23:18). The Court addresses these arguments in its summary judgment discussion.

1 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
 2 summary judgement. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
 3 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
 4 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
 5 materials outside of the pleadings, the motion to dismiss is converted into a motion for
 6 summary judgement. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
 7 Cir. 2001).

8 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
 9 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
 10 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
 11 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
 12 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
 13 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
 14 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
 15 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

16 **B. Summary Judgment**

17 The Federal Rules of Civil Procedure provide for summary adjudication when the
 18 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
 19 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
 20 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
 21 may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
 22 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to
 23 return a verdict for the nonmoving party. *Id.* “Summary judgment is inappropriate if
 24 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
 25 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A

1 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
2 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court applies a burden-shifting analysis. “When
4 the party moving for summary judgment would bear the burden of proof at trial, it must come
5 forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
9 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
10 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
11 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party failed to make a showing sufficient to establish an element essential to that party’s case
13 on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 323–24. If
14 the moving party fails to meet its initial burden, summary judgment must be denied and the
15 court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S.
16 144, 159–60 (1970).

17 If the moving party satisfies its initial burden, the burden then shifts to the opposing
18 party to establish that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
20 the opposing party need not establish a material issue of fact conclusively in its favor. It is
21 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
22 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
23 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
24 summary judgment by relying solely on conclusory allegations that are unsupported by factual
25 data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go

beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249–50.

III. DISCUSSION

The Court's below discussion first addresses the parties' cross-motions for partial summary judgment before addressing Defendants' Motion to Dismiss.

A. Cross-Motions for Partial Summary Judgment

Plaintiffs move for partial summary judgment on their entitlement to "management fees" under the Settlement Agreement that Sage paid to RDC during fiscal year 2014 ("FY14"). (*See* Pls.' MSJ 1:17–20, ECF No. 129). Plaintiffs essentially argue that: (a) the Settlement Agreement requires Defendants to pay Kory one-sixth of the management fees that Defendants received from Sage; (b) management fees were previously paid under the Sage Contract as amended; but (c) the Sage Contract was allowed to expire, and the management fees paid thereunder were incorporated into the CEO Services Contract, entitling Kory to the same. (*Id.* 2:16–3:8). Plaintiffs only move for partial summary judgment as to their right to management fees paid under the CEO Services Contract in FY14 because any disclaimers of Kory's rights to proceeds of the CEO Services Contract became ineffective once Ahmad allegedly resigned as CEO of Sage. (*Id.* 3:9–13, 23:24–28:19).

Plaintiffs' Motion for Partial Summary Judgment therefore requests that the Court hold Defendants breached the Settlement Agreement by failing to pay Kory one-sixth of the \$1,861,782.29 Defendants allegedly received for "management services" under the CEO

Services Contract in FY14. (*Id.* 2:26–3:8, 3:14–20). In the alternative, Plaintiffs seek the same for Defendants’ alleged breach of the implied covenant of good faith and fair dealing. (*Id.* 3:21–28). Defendants argue that Plaintiffs have no rights to the alleged management fees paid pursuant to the CEO Services Contract because the Settlement Agreement disclaims Plaintiffs’ rights to any such payment. (Defs.’ MSJ 2:6–11, ECF No. 138). Defendants also argue that even if the Settlement Agreement’s disclaimers are only effective when Ahmad serves as CEO of Sage, the disclaimers remained effective in FY14 because Ahmad continued to serve as corporate CEO of Sage, and he had only resigned the primarily-administrative role of hospital CEO. (*Id.* 19:26–23:18). The Court’s below discussion first considers Plaintiffs’ breach of contract claim.

i. Breach of Contract

The primary issue for the Court regarding Plaintiffs’ breach of contract claim is whether Kory disclaimed rights to all proceeds of the CEO Services Contract, even if the CEO Services Contract provides compensation for management services. The starting point for the interpretation of any contract is the plain language of the contract. *McDaniel v. Sierra Health and Life Ins. Co.*, 53 P.3d 904 (Nev. 2002). When a contract contains clear and unequivocal provisions, those provisions shall be construed to their usual and ordinary meaning. *Dickenson v. Nevada*, 877 P.2d 1059, 1061 (Nev. 1994). Then, using the plain language of the contract, the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances. *See NGA # 2 Ltd. Liab. Co. v. Rains*, 946 P.2d 163 (Nev. 1997); *see also Burrows v. Progressive Casualty Ins.*, 820 P.2d 748, 749 (Nev. 1991). Contractual construction is a question of law “suitable for determination by summary judgment.” *Ellison v. Cal. State Auto. Ass’n*, 797 P.2d 975, 977 (Nev. 1990).

Plaintiffs argue that because Ahmad allegedly resigned as CEO of Sage in February of 2014, there is no contract for Ahmad to serve as CEO of Sage after that date. (Pls.’ MSJ 23:25–

28:19). Defendants respond that the Settlement Agreement unambiguously disclaims Kory's interest in the CEO Services Contract. (Defs.' MSJ 14:25–19:25). Defendants further argue that even if the Court accepts Plaintiffs' proffered interpretation, the CEO exceptions in the Settlement Agreement remain applicable in FY14 because Ahmad resigned only as CEO of the hospital but remained CEO of the Sage Corporation. (*Id.* 19:26–23:18).

The Court begins its analysis by reviewing the language of the contract at issue. The relevant portion of the Settlement Agreement contains two paragraphs encompassing four material agreements between the parties. Paragraph 1.7 provides three of the relevant agreements: two related to the management fees Kory must receive under the Settlement Agreement and one exception. Paragraph 1.8 provides another exception to Kory's right to management fees. The Court provides the relevant quotations below.

Under ¶ 1.7, Defendants "will pay to KORY one-sixth (16.67%) of: (1) all management fees . . . that are paid by SAGE pursuant to the SAGE CONTRACT or any extensions or renewals thereof" (Settlement Agreement, Ex. 6 to Pls.' MSJ, ECF No. 130-5). Paragraph 1.7 also describes the intended scope of Kory's right to receive one-sixth of all management fees. It explains, "It is the intent of the parties that if [Defendants] or any of their owned or controlled entities executes a contract with SAGE that includes substantially the same services as are included in the currently existing contract and its extensions, KORY will be entitled to share in the payments received as part of this Agreement" (*Id.*).

The stated intent, however, is subject to exceptions under which Kory has no rights to receive any management fees. The agreement provides, "This paragraph [1.7] shall not apply to the contract for AHMAD to serve as CEO of SAGE." (*Id.*). Paragraph 1.8 includes a similar disclaimer that states, "Nothing in this AGREEMENT shall affect or give KORY any rights with respect to any contract pursuant to which AHMAD serves as the chief executive officer of Sage." (*Id.*).

1 For the most part, the effect of the agreements is straightforward. It is beyond dispute
 2 that Kory has the right to receive one-sixth of all management fees paid under the Sage
 3 Contract. (*Id.* ¶ 1.7). It is also beyond dispute that Kory has equal rights to management fees in
 4 future contracts when the management fees are substantially the same as those in the Sage
 5 Contract, unless an exception applies. (*Id.*). However, the meaning of the exceptions requires
 6 greater analysis.

7 The relevant exceptions provide that Kory has no rights to management fees paid under:
 8 (a) “the contract for AHMAD to serve as CEO of SAGE;” and (b) “any contract pursuant to
 9 which AHMAD serves as the chief executive officer of SAGE.” (*Id.* ¶¶ 1.7–1.8). The
 10 exceptions are unequivocal. If either of the two exceptions apply, then Defendants are not in
 11 breach of the Settlement Agreement by withholding any management fees paid under the CEO
 12 Services Contract in FY14. Consequently, the Court next construes the meaning of the
 13 exceptions.

14 The exception in ¶ 1.7, by using a definite article, refers to a specific contract in
 15 existence at the time of the Settlement Agreement’s execution: “the contract for AHMAD to
 16 serve as CEO of SAGE.” (Settlement Agreement ¶ 1.7); see *Cochise Consultancy, Inc. v.*
 17 *United States ex. Rel. Hunt*, 139 S. Ct. 1507, 1514 (2019) (“the use of the definite article . . .
 18 indicates that there is generally only one’ person covered.”) (quoting *Rumsfeld v. Padilla*, 542
 19 U.S. 426, 434 (2004); see also *Kaady v. Mid-Continent Cas. Co.*, 790 F.3d 995, 998 (9th Cir.
 20 2014) (“Use of the definite article ‘particularizes the subject which it precedes’”) (quoting
 21 *Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1246 (9th Cir. 2012)). By contrast, the
 22 exception in ¶ 1.8, by employing the adjective “any,” reaches all present and future contracts
 23 under which Ahmad “serves” as the CEO of Sage. (Settlement Agreement ¶ 1.8); Merriam-
 24 Webster, “any,” available at <https://www.merriam-webster.com/dictionary/any> (defining “any”
 25 to mean “one or some indiscriminately of whatever kind.”). Paragraph 1.8 also differs from

¶ 1.7 in that ¶ 1.8 disclaims all of Kory's rights created by the Settlement Agreement, whereas ¶ 1.7 only disclaims Kory's rights that ¶ 1.7 of the Settlement Agreement creates.

Therefore, the Court construes the ¶ 1.7 exception to disclaim Kory's rights to payment under the particular contract for Ahmad to serve as CEO of Sage that existed at the time of the execution of the Settlement Agreement.⁴ The Court finds that the ¶ 1.7 exception applies to "the contract" as long as the contract remains in effect, even if Ahmad ceases to serve as CEO, because the Settlement Agreement identifies the contract by its creation of the obligation for Ahmad to serve as CEO of Sage (it is "*the contract for*" Ahmad to serve as CEO of Sage), rather than Ahmad's performance under the contract. Put differently, a contract can be "the contract for AHMAD to serve as CEO of SAGE" even if Ahmad does not fulfill his obligation to serve as CEO.⁵

In contrast, the ¶ 1.8 exception refers to all present and future contracts under which Ahmad "serves" as CEO of Sage. Unlike the ¶ 1.7 exception, the scope of the ¶ 1.8 exception excludes any such contracts once Ahmad ceases to perform as CEO of Sage thereunder because the exception's scope is circumscribed by the time while "Ahmad serves as the chief executive officer of SAGE." Hence, if a contract directs Ahmad to serve as CEO of Sage, but Ahmad does not serve as CEO of Sage as directed under the contract, then the hypothetical contract is not one "pursuant to which Ahmad serves as the chief executive officer of SAGE."

⁴ The Court rejects Plaintiffs' argument that the term only disclaims an interest to payments Ahmad received as CEO, as opposed to the contract creating the CEO payment obligation; the position is foreclosed by ¶ 1.7's unambiguous references to "the contract" rather than a particular payment or provision. (*See* Pls.' MSJ 22:1–12).

⁵ The Court's conclusion is buttressed by its goal to interpret all contracts to avoid rendering any particular provision superfluous. *United States ex rel. K & R Ltd. v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 59 (D.C. Cir. 2006) ("The Court strives to give each term of a contract independent meaning, so that no word or clause is rendered nugatory."). If the Court applies Plaintiffs' proffered interpretation for the exceptions to apply only when Ahmad serves as CEO, then there is no circumstance the Court can imagine where the disclaimer of ¶ 1.7 would apply, but ¶ 1.8 would not.

Given that the Court finds “the contract for AHMAD to serve as CEO of Sage” refers to a particular contract, the Court next identifies the contract. The CEO Services Contract, which RH and Sage executed prior to the Settlement Agreement, appoints RH “to perform the duties and responsibilities of the position of Chief Executive Officer” of Sage. (CEO Services Contract ¶ C, Ex. 5 to Pls.’ MSJ, ECF No. 130-4). The same provision of the Contract then commands that RH “will dedicate the services of Ahmad R. Razaghi as its sole member to [Sage]” (*Id.*). Likewise, the First Amendment⁶ to the CEO Services Contract, which the parties executed after the Settlement Agreement but prior to FY14 states that “RH will initially dedicate the services of Ahmad R. Razaghi . . . as its Chief Executive Officer). (First Am. to the CEO Services Contract, Ex. 10 to Pls.’ MSJ, ECF No. 130-9). Thus, the Court concludes that “the contract for AHMAD to serve as CEO of SAGE” is the CEO Services Contract.

Furthermore, even though the parties dispute whether Ahmad continued to serve as CEO in FY14, the dispute is not material because Ahmad’s continued performance is irrelevant to the applicability of the disclaimer in ¶ 1.7 of the Settlement Agreement. Hence, Kory has no rights to any management payments made under the CEO Services Contract.

Therefore, the Court finds that Defendants are not in breach of the Settlement Agreement even if Sage and Defendants amended the CEO Services Contract to include payment for management services previously provided under the Sage Contract. Accordingly, with respect to Plaintiffs’ claim for breach of the Settlement Agreement, the Court denies Plaintiffs’ Motion for Partial Summary Judgment and grants Defendants’ Cross-Motion for Partial Summary Judgment. The Court next considers Plaintiffs’ claim that Defendants breached the implied covenant of good faith and fair dealing by retaining all management fees

⁶ The CEO Services Contract as amended by the First Amendment was the operative CEO Services Contract in FY14 because the First Amendment extended the contract term through 2025, and the Contract was not amended further until 2018. (*See* First Amendment to the CEO Services Contract, Ex. 10 to Pls.’ MSJ); (Second Amendment to the CEO Services Contract, Ex. E to Defs.’ MSJ, ECF No. 138-6).

1 previously paid under the Sage Contract by allegedly encouraging the Board not to renew the
2 Sage Contract and instead furnish the same payments under amendments to the CEO Services
3 Contract.

4 ii. Implied Covenant of Good Faith and Fair Dealing

5 In the alternative to breach of contract, Plaintiffs argue that Defendants breached the
6 Settlement Agreement's implied covenant of good faith and fair dealing by diverting funds
7 previously paid under the Sage Contract that Kory expected to receive under the Settlement
8 Agreement into the CEO Services Contract, under which Kory disclaimed rights to payment.
9 (See Pls.' MSJ 24:20–26:13). Defendants respond that Plaintiffs' claim fails as a matter of law
10 because it is contradicted by the express terms of the Settlement Agreement. (Defs.' MSJ
11 23:21–24:17). Defendants alternatively argue that they did not breach their duty to Plaintiffs
12 because the management fees provided under the CEO Services Contract were never similar to
13 management fees provided under the Sage Contract. (*Id.* 24:18–26:23).

14 A contractual breach of the covenant of good faith and fair dealing arises “where the
15 terms of a contract are literally complied with but one party to the contract deliberately
16 countervenes the intention and spirit of the contract.” *Hilton Hotels Corp. v. Butch Lewis*
17 *Prods., Inc.*, 808 P.2d 919, 923 (Nev. 1991). This cause of action stands in contrast to one for
18 breach of contract because of its requirement for literal compliance with the terms of the
19 contract. *See Kennedy v. Carriage Cemetery Services, Inc.*, 727 F. Supp. 2d 925, 931 (D. Nev.
20 2010). Consequently, allegations that a defendant violated the actual terms of a contract are
21 incongruent with this cause of action and insufficient to maintain a claim. *See id.*

22 Defendants argue that the Plaintiffs cannot state a claim as a matter of law because the
23 allegations contradict the express language of the Settlement Agreement, effectively increasing
24 Defendants' legal duties under the contract in contravention of Nevada law. (Defs.' MSJ
25 23:21–24:17). However, contrary to Defendants assertions, Plaintiffs are not attempting to add

1 to Defendants’ duties under the agreement. Rather, Plaintiffs are seeking to enforce the terms
 2 of the Settlement Agreement as the parties expressly stated they intended the terms would be
 3 performed despite Defendants’ literal compliance with the Settlement Agreement. (*See*
 4 Settlement Agreement ¶ 1.7). Given that Plaintiffs have shown: (a) Kory was entitled to
 5 receive management fees under the Settlement Agreement; (b) the parties to the Settlement
 6 Agreement expressly incorporated their intent that Kory would have rights to management
 7 payments made under the Sage Agreement or future contracts; but (c) the contracts referenced
 8 in the Settlement Agreement were terminated and amended to bar Kory from receiving his
 9 expected benefit of the bargain, the CEO Services Contract’s disclaimer itself does not bar
 10 Plaintiffs’ ability to recover under a theory of breach of the duty of good faith and fair dealing.

11 The core of the parties’ dispute concerns whether the management fees paid under the
 12 Sage Contract were, in fact, “morphed” into the CEO Services Contract. Specifically, the
 13 dispute hinges on whether ¶ 5.B of the original CEO Services Contract is equivalent to ¶ 5.B in
 14 the First Amendment to the CEO Services Contract.⁷ (*See* Pls.’ MSJ, Statement of Undisputed
 15 Facts ¶ 22.b). Paragraph 5.B of the CEO Services Contract, entitled “Performance Bonus,”
 16 provides that, “Based upon [RH]’s past performance of CEO functions for the Corporation
 17 pursuant to the prior Management Services Agreement with [MMA], and in consideration for
 18 [RH]’s continued service, [Sage] agrees to pay [RDC] a one-time performance bonus of
 19 \$25,000.00 within 20 days of execution of this Contract The Board shall perform a
 20 performance evaluation of [RDC] at the annual Board meeting each year to determine an
 21 annual performance bonus.” (CEO Services Contract ¶ 5.B, Ex. 5 to Pls.’ MSJ). Under ¶ 5.B of
 22 the First Amendment to the CEO Services Contract, entitled “Incentive Fee,” the Sage Board

23
 24 ⁷ Plaintiffs also argue that Defendants integrated management fees into the CEO Services Contract by removing
 25 the cap on RH’s earnings as CEO, but they provide no evidence in support of that theory outside of the
 contrasting contracts’ text. (*See* Pls.’ MSJ 25:27–26:6). The Court cannot discern the alleged management fees
 received as salary on top of fees allegedly remitted under ¶ 5.B of the First Amendment to the CEO Services
 Contract.

1 “shall perform a performance evaluation of RH at the annual Board meeting each year and
 2 determine an annual incentive fee.” (First Am. to the CEO Services Contract ¶ 5.B, Ex. 10 to
 3 Pls.’ MSJ). The provision also provides a formula to determine the incentive fee. RH was to
 4 receive an incentive fee “if the Board determines that RH’s performance [was] at least
 5 satisfactory.” (*Id.*). The incentive fee was to be calculated by subtracting the amount RH billed
 6 to the Board from “the fair market value of the professional services provided by RH during
 7 that year, including industry standard management fees.” (*Id.*). For comparison, under the Sage
 8 Contract, MMA was to receive a flat rate for management services, \$900,000 per year, with 5%
 9 increases semi-annually. (*See* Sage Contract Second Management Addendum ¶ 2, Ex. 4 to Pls.’
 10 MSJ, ECF No. 130-5).

11 Plaintiffs contend that Ahmad influenced the Sage Board of Directors to allow the Sage
 12 Contract and associated Management Addenda to expire and instead incorporate the
 13 management services from the Sage Contract into the CEO Services Contract. (TAC ¶¶ 18–22,
 14 27); (*See* CEO Services Contract, Ex. 7 to Pls.’ MSJ, ECF No. 130-6); (First Am. to the CEO
 15 Service Contract, Ex. 10 to Pls.’ MSJ, ECF No. 130-9); (Board Resolution, Ex. 9 to Pls.’ MSJ,
 16 ECF No. 130-8). Plaintiffs offer a variety of evidence in support of their position that the Sage
 17 Contract and CEO Services Contract as amended included payments for management services.
 18 Plaintiffs first direct the Court to the face of the First Amendment to the CEO Services
 19 Contract, which calculates the “incentive fee” by reference to “management services” that RH
 20 provides. (*See* First Amendment to CEO Services Agreement, Ex. 10 to Pls.’ MSJ, ECF No.
 21 130-9). Plaintiffs also highlight that Defendants themselves referred to the First Amendment to
 22 the CEO Services Contract as “an extension for management services” in a letter between
 23 Ahmad and Alva Tom of the Navajo Area Indian Health Service (“IHS”) (*See* IHS Letter, Ex.
 24 11 to Pls.’ MSJ, ECF No. 131-11). Internal records also refer to payments made under the
 25 CEO Services Contract as management payments or management fees, including records from

1 one of Defendants’ consultants and references in an internal audit. (*See* HAI Report and
2 Invoices, Exs. 13–21 to Pls.’ MSJ, ECF Nos. 130-10, 131-13–131-21); (S. Robert Bailey Aff.
3 and Audit Reports, Exs. 26–27 to Pls.’ MSJ, ECF Nos. 132-3–132-4). Finally, Defendants
4 appear to have used the same internal billing code—01.3801.6125—to refer to management
5 fees paid under the Sage Contract and the First Amendment to the CEO Services Contract.
6 (*Compare* MRS Invoice from November 2011 at 2565, Ex. 25 to Pls.’, ECF No. 132-2) (RDC
7 Invoice 1175 from March 2014 at 2914, Ex. 17 to Pls.’ MSJ, ECF No. 131-17) (both using
8 code to describe “management”).

9 Defendants respond that the terms of the CEO Services Contract show that Kory
10 knowingly disclaimed payment to some management fees because the CEO Services Contract
11 creates obligations involving the management of Sage in several provisions. (*See* CEO Services
12 Contract, Ex. 5 to Pls.’ MSJ) (directing RH to “oversee the supervision and effective
13 management of the day-to-day business operations of [Sage].”); (providing the Performance
14 Bonus “[b]ased upon [RH’s] past performance of CEO functions for the Corporation pursuant
15 to the prior Management Services Agreement . . .”). Defendants also argue that ¶ 5.B,
16 “Performance Bonus,” in the original CEO Services Contract and ¶ 5.B, “Incentive Fee,” in the
17 First Amendment to the CEO Services Contract are different names for the same payment. (*See*
18 Ahmad Decl. ¶ 25, Ex. F to Defs.’ MSJ, ECF No. 138-7). Defendants explain that the First
19 Amendment’s formula’s reference to “management fees” was added on advice from Sage’s
20 auditors to ensure that Sage would be in compliance with IRS regulations on tax-exempt
21 organization, but Defendants maintain that the management fees referenced are not for the
22 same management services provided under the Sage Contract. (*Id.*).

23 The Court finds that there is a genuine dispute of material fact regarding whether
24 Defendants subsumed management payments that were originally paid under the Sage Contract
25 into the CEO Services Contract. As a preliminary matter, the Court notes it is difficult to

1 disentangle what payments for which specific management services Kory retains rights to
2 under the Settlement Agreement. Plaintiffs are not entitled to all management fees paid under
3 the CEO Services Contract. By the Settlement Agreement's own terms, the parties only
4 expressed their intent that Kory continues to receive management fees similar to those paid
5 under the Sage Contract. (*See* Settlement Agreement ¶ 1.7). Plaintiffs knew or should have
6 known that Kory disclaimed the right to payment for some management services when
7 disclaiming rights in the CEO Services Contract. Not only does the CEO Services Contract
8 itself discuss payment for RH's management of Sage, but CEO services necessarily encompass
9 management services. A CEO, after all, is the highest-level manager of an organization.

10 However, given that the Sage Contract does not denote the particular management
11 services it furnished payment for—instead providing a flat rate for management services—the
12 Court is not in a position to assess whether the First Amendment to the CEO Services Contract
13 includes payment for management services like those bargained for in the Sage Contract but
14 not encompassed within the original CEO Services Contract. The Court finds that Plaintiffs'
15 evidence is sufficient to persuade a jury that the First Amendment to the CEO Services
16 Contract paid Defendants management fees previously provided under the Sage Contract.
17 Likewise, Defendants' affidavit of Ahmad indicates that the CEO Services Contract did not
18 include any management fees paid under the Sage Contract, and Defendants therefore have not
19 contravened the stated intent of ¶ 1.7 of the Settlement Agreement. Accordingly, the Court
20 denies both parties' Motions for Summary Judgment as to Plaintiffs' implied covenant of good
21 faith and fair dealing claim. The Court now turns to Defendants' Motion to Dismiss the Third
22 Amended Complaint.

23 **B. Motion to Dismiss**

24 Defendants move to dismiss all of Plaintiffs' claims to relief in the TAC. The Court's
25 below discussion addresses the sufficiency of each of the claims alleged.

i. Breach of Settlement Agreement

A Court may appropriately consider the terms of a contract at the motion to dismiss stage when the contract is referenced in the complaint and its terms are not in dispute. *See Branch*, 14 F.3d at 454. Here, the Court has already concluded in its preceding discussion that Plaintiffs cannot state a plausible claim that Defendants breached the Settlement Agreement by failing to pay Plaintiffs any management fees Sage remitted under the CEO Services Contract. Accordingly, the Court grants dismissal of Plaintiffs' breach of contract claim with prejudice.

ii. Breach of Duty of Good Faith and Fair Dealing

a. *Settlement Agreement*

In Nevada, an implied covenant of good faith and fair dealing exists in every contract, *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998), and a plaintiff may assert a claim for its breach if the defendant deliberately contravenes the intention and spirit of the agreement, *Morris v. Bank Am. Nev.*, 886 P.2d 454 (Nev. 1994). To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege: (1) plaintiffs and defendants were parties to an agreement; (2) defendants owed a duty of good faith to plaintiffs; (3) defendants breached that duty by performing in a manner that was unfaithful to the purpose of the contract; and (4) plaintiff's justified expectations were denied. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995).

Plaintiff has alleged sufficient facts to state a claim for breach of the implied covenant of good faith and fair dealing. The TAC alleges that (1) Plaintiffs and Defendants were parties to the Settlement Agreement; (2) Defendants owed a duty of good faith to Plaintiffs under the agreement; (3) Defendants performed in a manner unfaithful to the expressly stated intent of the Settlement Agreement by modifying the Sage Contract and the CEO Services Contract referenced in the agreement; (4) which interfered with Plaintiffs' justified expectations that

1 they would continue to receive a portion of the management fees paid by Sage. (*See* TAC
2 ¶¶ 31–32, 48–63, 79–84). The Court therefore denies dismissal of the claim.

3 However, as explained in the summary judgment discussion, the Court’s holding is
4 limited only to management fees paid under amendments to the CEO Services Contract—but
5 not the CEO Services Contract as it existed at the time the parties entered the Settlement
6 Agreement—because Plaintiffs disclaimed all rights to payment under the original CEO
7 Services Contract. Accordingly, to the extent Plaintiffs seek management fees paid under the
8 amended CEO Services Contract, the Court denies the Motion to Dismiss. To the extent
9 Plaintiffs seek management fees under the original CEO Services Contract, the Court dismisses
10 Plaintiffs’ claim with prejudice.

11 *b. Attentus Operating Agreement*

12 Plaintiffs allege that Ahmad breach his duty of good faith and fair dealing under the
13 Attentus Operating Agreement by concealing the approximately \$1.8 million Bonus Payment
14 from Kory and failing to remit any portion of the payment to Kory. (TAC ¶¶ 85–98, ECF No.
15 122). Defendants argue that the Court should dismiss the claim because: (1) it is barred by the
16 Release in the Settlement Agreement; (2) the allegations support a claim for breach of contract,
17 which is incongruous with a good faith and fair dealing claim; and (3) Plaintiffs have failed to
18 allege the purpose of the Operating Agreement or how the Defendants performed in a manner
19 contrary to that purpose. (Mot. Dismiss (“MTD”) 10:3–11:7, ECF No. 123).

20 The Court first addresses the release provision of the Settlement Agreement, which
21 would bar Plaintiffs’ claims to the Bonus Payment if the Court concludes that the release is
22 enforceable. Under ¶ 2.1 of the Settlement Agreement, the parties agreed that “[e]xcept for the
23 obligations created by the terms and conditions of this Agreement, the Parties . . . hereby
24 release and discharge each other party . . . from any and all actions, cause of action, suits, debts,
25 dues, sums of money, . . . and liabilities whatsoever, known or unknown . . . arising out of or in

1 connection with the ACTION, through and including the date of this AGREEMENT”
2 (Settlement Agreement ¶ 2.1).

3 Plaintiffs allege that Ahmad concealed the Bonus Payment from Sage prior to the
4 execution of the Settlement Agreement. (*See* TAC ¶¶ 36–46). The Bonus Payment relates to
5 the subject matter of the action referenced in the Settlement Agreement because the Settlement
6 Agreement arose from a dispute over Kory’s rights to payment from Sage to MMA and RH.
7 (*See id.* ¶¶ 29–31); (*see also* Settlement Agreement, Preliminary Statement ¶ B). Thus, the
8 terms of the release, if enforceable, would relieve Ahmad of any duty to pay Kory a portion of
9 the Bonus Payment.

10 However, the Court finds that although the release may bar Plaintiffs’ claims to the
11 Bonus Payment, dismissal is inappropriate. The Court may only grant a motion to dismiss a
12 claim on the basis of an affirmative defense if, from the facts alleged in the complaint, there is
13 no dispute that the affirmative defense would bar the claim. *See Asarco, LLC v. Union Pac.*
14 *R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (explaining that the court should not grant a
15 motion to dismiss on the basis of an affirmative defense if “from the allegations of the
16 complaint as well as any judicially noticeable materials, an asserted defense raises disputed
17 issues of fact.”). With respect to contract releases, a release may be voidable if it was procured
18 without the disclosure of all relevant facts. *See Las Vegas Ins. Adjusters v. Page*, 492 P.2d 616,
19 616 (Nev. 1972). Here, Plaintiffs allege facts indicating that Ahmad fraudulently concealed the
20 Bonus Payment in an attempt to avoid remitting a portion of the payment to Kory. (*See* TAC ¶¶
21 36–43). Accordingly, the Court finds that the facts alleged in the TAC raise a dispute regarding
22 the release’s enforceability, and the Court therefore cannot grant dismissal based on the terms
23 of the Release.

24 However, the Court finds that dismissal of the claim is appropriate because the
25 allegations more aptly state a breach of contract theory, which is inconsistent with breach of the

1 duty of good faith and fair dealing. Plaintiffs allege that Ahmad breached the Attentus
 2 Operating Agreement's terms by failing to remit to Kory "an equal share of all net revenue
 3 received from management services under the Sage Contract, healthcare consulting services,
 4 healthcare provider group and physician services, and 'all other related services.'" (TAC ¶¶
 5 18–19, 89–90, 92–93). However, a good faith and fair dealing claim requires that the defendant
 6 literally comply with the terms of the contract. *See Kennedy*, 727 F. Supp. 2d at 931. Here,
 7 given that the TAC alleges facts that would support a claim to breach of contract, but Plaintiffs
 8 could state a viable claim after amendment, the Court dismisses the claim without prejudice.

9 iii. Breach of Fiduciary Duty

10 Plaintiffs argue that Ahmad breached his fiduciary duty to Kory by "willfully concealing
 11 the existence of the Bonus Payment and refusing to pay Kory his share of the Bonus Payment."
 12 (TAC ¶¶ 99–104). Defendant seeks dismissal of the claim, arguing that the Plaintiffs do not
 13 adequately allege the existence of a fiduciary relationship, and the claim is time barred. (MTD
 14 11:18–12).

15 "A breach of fiduciary duty claim seeks damages for injuries that result from the tortious
 16 conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Stalk v.*
 17 *Mushkin*, 199 P.3d 838, 843 (Nev. 2009). A "fiduciary relation exists between two persons
 18 when one of them is under a duty to act for or to give advice for the benefit of another upon
 19 matters within the scope of the relation." *Id.* Moreover, fiduciary relationships arise where the
 20 parties do not deal on equal terms and there is special trust and confidence placed in the
 21 superior party. *Hoopes v. Hammargren*, 725 P.2d 238, 242 (Nev. 1986). To prevail on a breach
 22 of fiduciary duty claim, the plaintiff must establish: "(1) the existence of a fiduciary duty; (2)
 23 breach of that duty; and (3) the breach proximately caused the damages." *Klein v. Freedom*
 24 *Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009).

The Nevada Supreme Court has held that fiduciary duties arise as a matter of law in certain categories of relationships, including insurers and their insured, *Powers v. United Servs. Auto. Ass'n*, 979 P.2d 1286, 1288 (Nev. 1999); attorney and client, *Cook v. Cook*, 912 P.2d 264, 266 (Nev. 1996), spouses, *id.*; fiancés, *Fick v. Fick*, 851 P.2d 445, 449–50 (Nev. 1993); and corporate officers or directors and a corporation, *Leavitt v. Leisure Sports Inc.*, 734 P.2d 1221, 1224 (Nev. 1987). In relationships falling outside these categories, Nevada law recognizes a duty owed in “confidential relationships,” where “one party gains the confidence of the other and purports to act or advise with the other’s interests in mind.” *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995) (per curiam) (internal quotation marks and citation omitted).

Here, Plaintiffs have alleged that Ahmad breached a fiduciary duty to disclose the Bonus Payment to Kory, causing Plaintiffs damages. (TAC ¶¶ 99–104). However, the Court must dismiss the claim because Plaintiffs have not alleged sufficient facts to demonstrate that Ahmad owed Kory a fiduciary duty. The brothers’ relationship does not fall into any of the per se fiduciary relationships recognized by the Nevada Supreme Court. Nor do Plaintiffs allege facts indicating that Kory placed a special confidence in Ahmad, obligating Ahmad to act in Kory’s best interest. Plaintiffs’ conclusory assertion that a fiduciary relationship existed is insufficient to sustain the claim. Thus, the Court grants dismissal of the claim without prejudice.⁸

iv. Unjust Enrichment

Plaintiffs plead their claims for unjust enrichment in the alternative, “In the event the Court finds that no written contract” requires the payments described in the Settlement Agreement. (Compl. ¶¶ 109–110). Defendants argue that the claim should be dismissed because it seeks payments allegedly required by contract. (MTD 17:24–18:12).

⁸ For the same reasons discussed regarding the enforceability of the Settlement Agreement’s release, the Court finds dismissal on the statute of limitations inappropriate at this stage of the proceedings because the limitations period may be tolled under the discovery rule. *See* NRS § 11.190.

As explained in the summary judgment discussion, the Settlement Agreement provided Kory rights to payments made under the Sage Contract and similar agreements, but the relevant question is whether Defendants' literal compliance with the Settlement Agreement violated their duty of good faith and fair dealing. Accordingly, because there is a written contract creating the obligations Plaintiffs now seek to enforce, the Court dismisses the claim with prejudice as to the management fees. *See LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997) ("An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement."). The Court dismisses without prejudice Plaintiffs' claim to the Bonus Payment because it remains uncertain whether the alleged right to payment derives from the terms of a contract.

v. Conversion

Plaintiffs' conversion claim alleges that Defendants converted the management fees owed under the Settlement Agreement and the Bonus Payment. (*See* TAC. ¶ 115). Defendants argue that Plaintiffs must state a claim to an identifiable sum of money, and the claims are foreclosed by the economic loss doctrine. (MTD 12:15–13:7).

Although Plaintiffs argue that the claim is permissible because it is pled in the alternative to breach of contract, Plaintiffs' only alleged rights to one-sixths of the at-issue payments or a portion of the Bonus Payment arise *because of* the Settlement Agreement or other contract. Accordingly, to the extent Plaintiffs rely on contractual theories of recovery, the claim is foreclosed by the economic loss doctrine as a matter of law. *Kenny v. Trade Show Fabrications W., Inc.*, No. 2:15-cv-410-JCM-VCF, 2016 WL 697110, at *5 (D. Nev. Feb. 18, 2016) ("Absent direction to the contrary from Nevada state courts, a claim for conversion rooted in defendants' failure to make payment pursuant to contract between the parties contravenes the purpose of the economic loss doctrine, and is therefore barred."). The Court

1 therefore dismisses the claim with prejudice with respect to management fees. The Court
 2 dismisses the claim without prejudice with respect to the Bonus Payment because it is uncertain
 3 whether Plaintiffs' alleged right to the payment derives from the terms of a contract.

4 vi. Intentional Interference with Contract

5 Plaintiffs assert that Ahmad intentionally interfered with the MMA Operating
 6 Agreement by failing to remit the Bonus Payment to MMA. (TAC ¶¶ 120–128). Defendants
 7 argue that the claim fails as a matter of law because a party cannot be liable for intentionally
 8 interfering with its own contract, and Plaintiffs have not sufficiently alleged the elements of the
 9 claim under Nevada law. (MTD 13:10–28).

10 To state a claim for intentional interference with contract under Nevada law, a Plaintiff
 11 must allege: (1) the existence of “a valid and existing contract; (2) the defendant’s knowledge
 12 of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship;
 13 (4) actual disruption of the contract; and (5) resulting damage.” *J.J. Industries, LLC v. Bennett*,
 14 71 P.3d 1264, 1267 (Nev. 2003).

15 The Court finds that Plaintiffs have adequately alleged the claim, and they are not barred
 16 from asserting the claim as a matter of law. Plaintiffs have alleged: (1) the MMA Operating
 17 Agreement was a valid contract that obliged MMA to remit a portion of the Bonus Payment to
 18 Kory; (2) Ahmad knew of the contract; (3) Ahmad intentionally directed Sage to pay the Bonus
 19 Payment to RH instead of MMA to avoid payment to Kory; (4) disrupting Kory’s rights under
 20 the MMA operating agreement; (5) causing Plaintiffs’ damages. (TAC ¶¶ 120–128). Plaintiffs
 21 allege that Attentus was a party to MMA, but Ahmad was not. (*Id.* ¶¶ 8–9, 123). The allegation
 22 is sufficient to show that Ahmad was not a party to the MMA Operating Agreement because a
 23 limited liability company is a distinct legal entity from its members. *Cf. C.H.A. Venture v. G.C.*
 24 *Wallace Consulting Engineers, Inc.*, 794 P.2d 707, 709 (Nev. 1990).

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vii. Accounting

Plaintiffs argue that Defendants owe Plaintiffs an accounting for all payments made by Sage to Defendants and any entities owned or controlled by Defendants. (TAC ¶¶ 129–134). Defendants seek dismissal of the claim because of the absence of a fiduciary relationship between the parties. (MTD 14:1–25).

To state a plausible claim to an accounting, there must be a fiduciary relationship between the parties. *McNamara v. Voltage Pay Inc.*, No. 2:15-cv-02177-JAD-GWF, 2017 U.S. Dist. LEXIS 137558, 2017 WL 3709057, at *4 (D. Nev. Aug. 28, 2017). As the Court addressed previously, Plaintiffs have not alleged sufficient facts to show the presence of a fiduciary relationship. Accordingly, the Court grants dismissal of Plaintiffs’ accounting claim without prejudice.

viii. Civil Conspiracy

Plaintiffs assert a claim to civil conspiracy, arguing that Defendants conspired together to harm Plaintiffs. (TAC ¶¶ 135–142). Defendants argue that the claim should be dismissed because it is not alleged with particularity. (MTD 14:26–15:23).

A claim for civil conspiracy sounding in fraud must be alleged with specificity. *See Diamond Resorts Int’l, Inc. v. Reed Hein & Assocs., LLC*, No. 2:17-cv-03007-APG-VCF, 2019 U.S. Dist. LEXIS 205358, 2019 WL 6310717, at *7 (D. Nev. Nov. 25, 2019). The parties dispute whether Plaintiff has sufficiently alleged a conspiracy. (*See* MTD 14:27–15:23); (MTD Resp. 20:22–21:17). Plaintiffs contend that asserting the Defendants “conspired together” to harm Plaintiffs, while incorporating the previous allegations by reference, is sufficient. (MTD Resp. 20:22–21:17). The Court disagrees. Here, Plaintiffs allege the ultimate outcome of the alleged conspiracy—Plaintiffs’ being deprived the benefit of their bargain with Defendants—but Plaintiffs fail to allege any facts regarding the agreement between Defendants, their plan to allegedly defraud Plaintiffs, or the like. (*See id.*) (showing that Plaintiffs have alleged only the

participants, damages, and timing of the conspiracy); (*see also* TAC ¶¶ 135–139).

Accordingly, the Court dismisses without prejudice Plaintiffs’ Civil Conspiracy claim.

ix. Alter Ego

To state a claim for alter ego liability, a plaintiff must allege: (1) the corporation is influenced and governed by the person asserted to be the alter ego; (2) there is such unity of interest and ownership that one is inseparable from the other; and (3) the facts are such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction fraud or promote injustice. See Nev. Rev. Stat. § 78.747; *see also Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884, 886 (1987). Conclusory allegations of alter ego status are insufficient to state a claim to relief. *Donovan v. Flamingo Palms Villas, LLC*, No. 2:08-cv-01675-RCJ-RJJ, 2009 U.S. Dist. LEXIS 150421, 2009 WL10693913, at *6 (D. Nev. June 23, 2009)

Here, Plaintiffs sufficiently establish alter ego liability by alleging that RDC is solely owned by Ahmad, Ahmad and RDC intermingle funds, and failure to recognize alter ego liability would therefore cause injustice. (TAC ¶¶ 144–145). Accordingly, the Court denies dismissal of Plaintiffs’ alter ego liability claim.

x. Successor Liability

Plaintiffs argue that all business entity Defendants share uniformity with their officers, supporting a claim to successor liability. (TAC ¶¶ 146–147). Defendants respond that the allegation is insufficiently pleaded because it does not identify any entities who are predecessors to the liability alleged. (MTD 17:11–24).

To state a claim for successor liability, a plaintiff must at minimum allege the entities who share the liability succeeded to. *See S.E.C. v. v. Inteligentry, Ltd.*, No. 2:13-cv-00344-RFB-NJK, 2015 WL 1470498, at *15 (D. Nev. Mar. 31, 2015). Here, Plaintiffs do not even allege the entities who are predecessors or successors to the liability at issue, instead lumping

1 together all Defendants. (TAC ¶ 147). The Court therefore dismisses the claim without
2 prejudice.

3 xi. Punitive Damages

4 Plaintiffs do not allege an independent claim to punitive damages; rather, the TAC seeks
5 punitive damages in Plaintiffs' fiduciary duty and civil conspiracy claims, and it lists punitive
6 damages in the relief sought at the conclusion of the TAC. (TAC ¶¶ 102, 141, 20:16). Here,
7 because the Court has dismissed Plaintiffs' claims for punitive damages, the Court need not
8 address whether the Court should dismiss Plaintiffs' generalized request for punitive damages
9 as Defendants urge. (*See* MTD 22:11–23:11). The Court next addresses whether Plaintiffs
10 should be given leave to amend the claims dismissed without prejudice.

11 **C. Leave to Amend**

12 For all claims the Court has dismissed without prejudice, the Court provides Plaintiffs
13 leave to amend. Defendants argue that amendment would be futile because Defendants have
14 now filed four Complaints in this action. (MTD 18:19–19:9). However, Plaintiffs have not yet
15 had the benefit of a court order identifying the deficiencies of the Complaints because each
16 Amended Complaint has been filed based on Plaintiffs' request for leave to amend, which
17 Defendants have consented to on each occasion. (*See* Stipulations to Amend, Non-Oppositions
18 to Mots. Amend, ECF Nos. 47, 63, 119). Plaintiffs may file an Amended Complaint within
19 twenty-one (21) days from entry of this Order. Failure to file an Amended Complaint by the
20 deadline provided will result in dismissal of the unamended claims with prejudice.

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1 **IV. CONCLUSION**

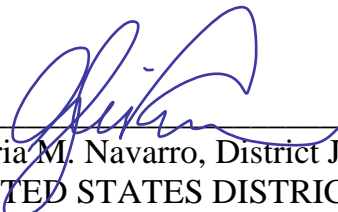
2 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss, (ECF No. 123), is
3 **GRANTED in part** and **DENIED in part**.

4 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Partial Summary Judgment,
5 (ECF No. 129), is **DENIED**.

6 **IT IS FURTHER ORDERED** that Defendants' Cross-Motion for Partial Summary
7 Judgment, (ECF No. 138), is **GRANTED in part** and **DENIED in part**

8 **IT IS FURTHER ORDERED** that Plaintiffs may file an Amended Complaint within
9 twenty-one (21) days from entry of this Order. If no Amended Complaint is filed, the parties
10 shall have an additional thirty (30) days to file a Joint Proposed Pretrial Order.

11 Dated this 30 day of September, 2020.

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16 Gloria M. Navarro, District Judge
17 UNITED STATES DISTRICT COURT
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